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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-348

B. V. CLEMONS, L.P.T., *et. al., Appellants,*

vs.

UNITED STATES OF AMERICA, *et. al., Appellees.*

On Appeal From The United States District Court
For The Southern District of Ohio
Eastern Division

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

The Appellants, pursuant to the United States Supreme Court Rules 13 (2) and 15, file this, their statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal from a Three-Judge District Court to review the Final Order dismissing Appellants' complaint, and should exercise such jurisdiction in this case.

I. OPINION BELOW

The opinion of the Three-Judge District Court for the Southern District of Ohio, Eastern Division is not yet reported. The order and the opinion of the Court are set forth in Appendix A hereto.

II. JURISDICTION

The appeal herein is from a final decision made and entered by a United States District Court for the Southern District of Ohio, Eastern Division, specially constituted under 28 U.S.C. §§2282 and 2284 upon the plaintiff's application for declarative relief and an interlocutory and permanent injunction to restrain the enforcement, operation and implementation of an Act of Congress, to wit, Section 251(c) of the Social Security Amendments of 1972, 81 Stat. 851, 42 U.S.C. §1395x (v) (5) (A), for repugnance to the due process clause of the Fifth Amendment of the Constitution of the United States of America. The judgment of the Court was entered on March 26, 1975, and Notice of Appeal was filed in that Court on May 23, 1975. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253.

III. QUESTIONS PRESENTED

Professional physical therapists spend a significant number of years becoming educated, trained, and experienced so as to be able to render professional services on a level generally consistent with the professions of the other healing arts. Qualifications for persons who wish to become or practice physical therapy are regulated by law. In Ohio the qualifications and practice requirements are set forth in Chapters 4731 and 1785 of the Ohio Revised Code.

No corporation (including hospitals, skilled nursing homes and home health agencies) can become licensed to

promote, practice or render physical therapy to the public under Ohio law, except professional corporations comprised of physical therapists associating together, and such therapy should be performed in a non-professional corporation by a licensed therapist under a contractural arrangement as an independent contractor. Section 1701.03, 1785.01 (A) (B), 1785.03, 4731.70 (A) and 4731.73 (A) Ohio Revised Code. Many physical therapists are employed on a salary basis in corporations, (as are many physicians) and may render service to employees therein but are not permitted to hold out and perform professional services as an employee of a non-professional corporation to the public-at-large. In this way, Ohio prevents corporations from practicing a profession and profiting from the potential exercise of unethical conduct and methods.

Until 1972, physical therapists practicing as permitted by Ohio law in associations and rendering their services under contractural arrangements with institutional health related entities (which comprise over eighty-five percent of the demand for therapy services), were indirectly compensated under Medicare by a method relating unit of service to actual cost. In October, 1972, Congress passed a law creating a new method to reimburse health entities ("providers") for physical therapy services. This formula, called "salary equivalency" essentially limits provider reimbursement to what Medicare defines as "reasonable costs": that amount equal to what the provider could pay a "salaried therapist" to perform the same work done by the "contracting therapist" (regardless of the actual cost incurred by the provider in so doing). This new law ex-

pressly would not apply to those professionals included in the Medicare definition of "physician" but did include all therapists, professional social service workers and allied medical service workers. All of the persons included in the coverage of the law, except the physical therapist, could become (and usually are) employees of a provider and thereby would not be practicing a profession in violation of Ohio law. Since providers in Ohio cannot employ a physical therapist and hold out his service to the public for renumeration, the law in question creates an artificial and arbitrary classification among physical therapists that actually reduce and eliminate the amount of therapy service to Medicare beneficiaries in provider settings.

In the above context presented for review are the following questions:

1. Whether a federal law admittedly providing for unequal treatment within the same class of medical professionals must be declared unlawful, and its implementation enjoined;

   a. Because it is not rationally related to a legitimate governmental interest.

   b. Because it violates the express mandate of Medicare law prohibiting governmental control or supervision over the operation of a provider or person providing health services.

   c. Because in its application the provider would be placed in direct violation of state laws prohibiting

the unauthorized practice of physical therapy, and the licensed professional would be in violation of his license to practice.

2. Whether Appellants are denied equal protection of the laws guaranteed by the Fifth Amendment by the implementation of "salary equivalency" which operates as a major impingement upon the viability of licensed physical therapists to associate and practice their profession.

IV. STATUTES INVOLVED

Section 1395 x (v) (5) (A), the constitutionality of which is challenged by Appellants provides:

> "Where physical therapy services . . . are furnished under an arrangement with a provider of services or other oganization, . . . the amount included in any payment to such provider or other organization . . . as the reasonable costs of such services . . . shall not exceed an amount equal to the salary which would reasonably have been paid for such services (together with any additional costs that would have been incurred by the provider or other organization) to the person performing them if they had been performed in an employment relationship with such provider or other organization plus the cost of such other expenses (including a reasonable allowance for travel-time and other reasonable types of expense related to any differences in acceptable methods of organization for the provision of such therapy) incurred by such person."

Various sections of the Medicare Act (technically the Health Insurance for the Aged Act, 42 U.S.C. §§1395 et seq.), the Fifth Amendment to the Constitution of the United States of America, and sections of Chapter 4731 and 1785 of the Ohio Revised Code are also involved herein and are set forth in Appendix B.

V. STATEMENT OF THE CASE

A. The Medicare Act

The Medicare Act ("Act") "provides basic protection against the costs of hospital and related post-hospital services . . . for individuals who are age 65 or over" and are entitled to benefits. 42 U.S.C. §1395 (c). Beneficiaries are entitled to receive services covered by the Act from hospitals, extended care facilities, or home health agencies qualified to participate in the program. Such institutions are called "providers of services" or "providers". 42 U.S.C. §1395x (u). The Act provides coverage for physical therapy services rendered to a beneficiary at a providers facility.

B. Appellants

Appellant Clemons and others are licensed physical therapists who render professional services as required by their regulatory practice statutes. All Appellants service providers as defined in the Act, and all deliver their service in largely rural areas where their services are frequently the only therapy service in the county or tri-county area. Appellants have staffs of associate therapists and aides to render service, and have invested considerable money in

equipment, training, education and time in providing therapy service to areas not otherwise able to attract therapists.

After passage of the "salary equivalency" law and the publishing of the proposed regulations thereto, providers began cancelling their service contracts, and began requesting Appellants to become salaried therapists (in violation of Ohio professional practices law) because the new method of provider reimbursement allowed them to continue to be reimbursed fully by Medicare on a "reasonable cost" basis only if the Appellants were in the different statutory classification of therapist.

Rather than disband their associations or risk the loss of licensure for aiding unauthorized practice of physical therapy, Appellants filed their lawsuit on December 28, 1973 in the District Court to challenge the constitutionality of the arbitrary and capricious statute, and for declarative and injunctive relief.

C. Summary of This Litigation

1. and 2. Appellants Action and Jurisdiction of the District Court

Jurisdiction of Appellants' action in the District Court was founded upon 28 U.S.C. §§1331 and 2201, venue upon 28 U.S.C. §1391(e). On July 3, 1974, Appellants filed their motion for the convening of a three-judge district court and a motion for temporary restraining order and preliminary injunction. A Three-Judge District Court was designated in accordance with 28 U.S.C. §2284 on

August 19, 1974. Appellants moved for summary judgment on September 25, 1974. On the pleadings, the District Court filed its opinion and order granting summary judgment for Appellees and dismissing the complaint on March 26, 1975.

3. Decision Below

The District Court, in granting the Appellees summary judgment, held in a decision with one dissent that, despite the admitted discrimination against the Appellants, the "salary equivalency" regulation in question was constitutional as reaching a legitimate governmental purpose. The dissenting judge stated that the record before the Court did not present sufficient evidence to sustain a rational relationship between the salary equivalency regulation in question and a legitimate governmental interest, and that genuine issues of fact existed as to whether the statute was constitutional in its application to Appellants.

VI. REASONS FOR THIS COURT GRANTING JURISDICTION.

A. Existence of Conflict of Decisions Between Lower Courts on Important Questions of Federal Law Which Have Not Been, but Should be Settled by the Supreme Court.

Because of the novel and far reaching significance of regulations and statutes implemented by the Department of Health, Education and Welfare relating to amendments to the Social Security Act, court decisions on similar and identical issues in this case have been decided recently in conflict with other lower courts, and with precedents long ago approved by this Court. For this reason and others presented herein, important questions and issues relating

to the right of medical professionals to be free from invidious, capricious and arbitrary congressional classifications which do not have for their basis either a compelling governmental interest or a legitimate rational basis must be resolved by this Court.

It is said that hard cases make bad law. So, perhaps, may deceptively simple cases, in which the appearance of simplicity is contributed to by a lower court decision which proceeds upon incorrect, unexpressed premises and which treats the issues of the cause *simpliciter*. Such, Appellants respectively submit, is this case, because of the failure of the lower court to consider the fundamental rights of Appellants affected by this law, a premise which is manifestly a false start which when pursued necessitates fallacious conclusions.

The issues and questions involved in this appeal have important national significance and affect millions of Americans dependent upon therapy services from the Medicare program. Several cases with identical facts and issues are pending in lower courts and courts of appeals and will ultimately be presented to this Court for resolution and clarification of the same constitutional standards and precedents requested to be determined by this Court in this appeal.

Rather than present a full argument here, which would be more appropriately presented by the briefs or on argument, Appellants submit that the recent decisions in the following cases create great doubt and conflict as to the consitutional standard and precedents to be applied to assess the right to associate together for business and the right

to contract or practice one's profession when these rights come in conflict with an Act of Congress; *Association of American Physicians and Surgeons v. Weinberger,* U. S. District Court Northern District of Illinois, Eastern Division. Civil No. 73-C-1653 (decided May 8, 1975 before a three-judge court) *American Medical Association v. Weinberger,* U. S. District Court Northern District of Illinois, Eastern Division. Civil No. 75-C-560 (decided June 5, 1975) *Johnson's Professional Nursing Home v. Weinberger,* (1974) 490 F. 2d 841. *Physical Therapy Services Rehabilitation Agency v. Weinberger,* U.S. District Court, District of Columbia, Civil No. 74-897 (decided July 18, 1975).

In view of the precedents relied upon in the decision of the Three-Judge District Court below and the subsequent decisions on identical issues by other courts interpreting the same legal precedents (with particular reference to economic social welfare legislation) the constitutional standards to be applied and the appropriateness of the precedents are now in need of review and clarification by this Court.

B. The Conclusions or Facts Found by the District Court Supporting Its Decision Were Contrary to the Allegations of Appellants Complaint, Were Sharply Refuted by Appellees' Concessions and Appellants' Supporting Documentation and So Far Departs From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of the Supreme Court's Power of Supervision.

The Three-Judge District Court in dismissing Appell-

ants' complaint as being without merits necessarily rejected the uncontroverted facts supplied in the pleadings, affiidavits and documents submitted by various therapists, and the admission by the defendant that the law in question does create disparate treatment among those in the same classification created by "salary equivalency." If one treats the Court's decision as a dismissal of the complaint for failure to state a claim, then the "allegations of the complaint and supporting affidavits [must be accepted] as true" *Gardner v. Toilet Goods Association,* 387 U.S. 167, 172 (1967). Assertions of fact inconsistent with allegations in the complaint must be disregarded. The Court below ignores this established principle of judicial construction.

If on the other hand, the Court's decision is treated as a grant of summary judgment to defendants, its action is clearly unjustified. In that event, if material facts are genuinely at issue, the motion for summary judgment must be denied — "factual issues are not to be tried or resolved by summary judgment procedure." *Elgin, J. & E. Ry. Co. v. Burley,* 325 U.S. 711, 719 (1945), *Bohn Aluminum & Brass Corp. v. Storm King Corp.* (CA 6th, 1962), 303 F. 2d, 425, 427. The conclusions the Court reached were pointedly disputed by the parties below and is the significant reason why the decision of the Court was not unanimous. The conclusions of the Court below were amply refuted and significantly the government failed to demonstrate even a legitimate rational basis for the classification and discrimination in question to the purposes for the Medicare program.

The Court below, by assuming or accepting facts in the

government's favor has denied Appellants their opportunity to prove a case well pleaded and documented. In that respect its treatment of the factual issues is a perversion of the accepted and usual course of judicial proceedings. This calls for an exercise of the Supreme Court's power of supervision, in order to protect the integrity of the adjudicative process.

CONCLUSION

For the foregoing reasons, the Supreme Court should note probable jurisdiction and grant Appellants an opportunity to obtain judicial redress.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

B. V. CLEMONS, L.P.T., et al. :

Plaintiffs :

vs. Civil Action 73-530

UNITED STATES OF AMERICA, et al. :

Defendants :

OPINION

Before John W. Peck, Judge, United States Court of Appeals for the Sixth Circuit; Joseph P. Kinneary, Chief Judge United States District Court; and Robert M. Duncan, United States District Judge.

Kinneary, Chief Judge. Plaintiffs in this action seek declaratory and injunctive relief against a federal statute and regultions governing the payment of fees to physical therapists under the Medicare Act.

This matter is before the Court on the amended complaint and answer, the parties' cross motions for summary judgment, and affidavits filed in support of these motions. Alternatively, defendants have moved to dismiss.

The plaintiffs, licensed physical therapists, contend that enforcement of the challenged statute discriminates against their profession in a manner which denies them equal pro-

tection of the law. Defendants argue that a rational relationship exists between the statutory classification and legislative interest.

The Court renders judgment in favor of the defendant Caspar Weinberger and defendant Department of Health, Education and Welfare.

Plaintiffs are twelve independent, licensed physical therapists who are eligible to render services under the Medicare Act.

Defendant Caspar Weinberger is Secretary of the Department of Health, Education and Welfare which administers the Medicare Act.

The Medicare Act, 42 U.S.C. §1395, *et seq.*, is intended to provide "basic protection against the costs of hospital and related post-hospital services . . . for individuals who are age 65 or over" and are entitled to benefits under the Act. 42 U.S.C. §1395c. Medicare beneficiaries receive services from hospitals, extended care facilities and home health agencies which are qualified to participate in the program. These institutions are "providers of services", 42 U.S.C. §1359x (u), which are reimbursed by either the Secretary or certain private organizations (e.g., Prudential; Blue Cross; and Blue Shield) acting as fiscal intermediaries. Although plaintiff independent physical therapists render services to Medicare beneficiaries, they do not receive payment from the Secretary or the beneficiary because they do not qualify as "providers of services" under §1359x (u). Instead, they contract with "providers of services" to perform physical therapy for Medicare beneficiaries. The "provider of services" then pays the physical therapist for his services.

Congress has enacted Public Law 92-603, Section

251(c), which is codified at Title 42, United States Code, Section 1395x (v) (5) (A) to regulate fees paid physical therapists. This section provides that:

> Where physical therapy services . . . or other therapy services or services of other health-related personnel (other than physicians) are furnished under an arrangement with a provider of services or other organization, specified in the first sentence of subsection (p) of this section the amount included in any payment to such provider or other organization under this subchapter as the reasonable cost of such services (as furnished under such arrangements) shall not exceed an amount equal to the salary which would reasonably have been paid for such services (together with any additional costs that would have been incurred by the provider or other organization) to the person performing them if they had been performed in an employment relationship with such provider or other organization (rather than under such arrangement) plus [other expenses reasonably related to the therapy] as the Secretary may in regulations determine to be appropriate.

The Secretary has proposed regulations further defining the manner in which therapists will be paid.

Plaintiffs seek a declaration that the statute is unconstitutional, and injunctions against the enforcement of the statute and publishing of the regulations.

Plaintiffs move for summary judgment on the grounds that there is no genuine issue as to any material fact and that they are entitled to judgment as a matter of law. Defendants move for summary judgment on the grounds that

I

(1) plaintiffs lack standing; (2) venue is improper; (3) the Court lacks subject matter jurisdiction; and (4) the amended complaint fails to state a claim for which relief can be granted.

Defendants argue that plaintiffs do not have standing to challenge the Medicare Act because their interests are not within the zone of interests protected by the Act. *See, Schroeder Nursing Care, Inc.* v. *Mutual of Omaha Insurance Co.,* 311 F. Supp. 405, 409 (E.D. Wisc. 1970).

The preliminary inquiry in standing questions is whether there is a case and controversy between the parties. See. *DeFunis* v. *Odegaard,* 416 U.S. 312, 316 (1974). Plaintiffs, as independent, licensed physical therapists eligible to render services to beneficiaries under the Medicare program, are adversely affected by the limitation on their fees imposed by §1395x (v) (5) (A). The uncontroverted affidavit of plaintiff B. V. Clemons establishes that he renders services to "providers of services" under the Act, and that the amount of his fees will be adversely affected when §1395x (v) (5) (A) becomes effective.[1] Plaintiffs are not required to suffer actual loss before seeking declaratory and injunctive relief.

When a case or controversy exists, the Court must determine "whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise." If there is injury in fact, the Court must then decide "whether the interest sought to be protected by the com-

[1] Public Law 92-233, Section 17 postponed the effective date of §1395x (v) (5) (A) to the month in which final implementing regulations are promulgated by the Secretary. Proposed regulations were published May 28, 1974, 39 Fed. Reg. 18468-69.

plainant is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question." *Data Processing Service* v. *Camp,* 397 U.S. 150, 152-153 (1970).

The complaint alleges an economic injury in fact. But the defendants argue that plaintiffs' interest — being paid for their services — is not within the zone of interests protected or regulated by the statute. The Medicare program attempts to protect its beneficiaries from the costs of hospital and related posthospital services. 42 U.S.C. §1395c. One element of this protection is the establishment of the maximum costs covered by Medicare.[2] This is, in effect, a regulation of the provider of services and those individuals who contract with providers to render services to Medicare beneficiaries. The interest plaintiffs seek to protect — their fees — is thus regulated by the Act to promote the purposes of the Medicare program. The Court concludes that plaintiffs have standing to sue. *Cf. New Jersey Chapter Inc. of the American Physical Therapy Association* v. *Prudential,* 502 F. 2d 500, 504 (D.C. Cir. 1974).

II

Defendants challenge venue. Title 28, United States Code, Section 1391 (e) provides:

> A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may except as otherwise provided by law, be brought in

[2] This regulation directly protects Medicare beneficiaries from inflated health care costs. It also is essential to the overall viability of the program, because the government must husband limited resources to provide the maximum protection to the largest number of needy persons.

> any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

No real property is involved in this action. Named plaintiff B. V. Clemons resides in the Southern Judicial District of Ohio. Thus, venue is proper. *Natural Resources Defense Council, Inc.* v. *TVA,* 340 F. Supp. 400, 405-406 (S.D. N.Y. 1971).

III

Plaintiffs assert jurisdiction under the provisions of Title 28, United States Code, Sections 1331 (a).[3] Defendants contend that the Court does not have subject matter jurisdiction because (1) the government has not consented to suit and (2) plaintiffs have not demonstrated the existence of the jurisdictiontional amount of $10,000 in controversy.

The Medicare Act does not provide for judicial review of the Act's constitutionality. However, the trend in the case law is to imply a cause of action arising by implication from the Constitution when a plaintiff alleges that the government has deprived him of a constitutional right. See, *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 392, 395-297 (1971); *Jacobs* v. *United States,* 390 U.S. 13 (1933); *City of Kenosha* v. *Bruno,* 412 U.S. 507, 516 (1973) Brennan, J. concurring); *Dahl* v. *City of Palo Alto,* 372 F. Supp. 647, 649 (N.D. Calif. 1974); *James* v. *United States,* 358 F. Supp. 1381, 1386-1387 (D. R.I. 1973); *Cortright* v.

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[3] The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States. 28 U.S.C. §1331 (a).

Resor, 325 F. Supp. 797, 809-811 (E.D. N.Y.), *reversed on other grounds,* 447 F. 2d 245 (2d Cir. 1971), *cert. denied,* 405 U.S. 965 (1972). *But cf. Bivens,* 403 U.S. *supra* at 409; *Wahba* v. *New York University,* 492 F. 2d 96, 103 (2d Cir 1974); *Perzanowski* v. *Salvio,* 369 F. Supp. 223, 229-231 (D. Conn. 1974); *Smothers* v. *Columbia Broadcasting System, Inc.,* 351 F. Supp. 622, 626 n. 4 (C.D. Calif. 1972); *Davidson* v. *Kane,* 337 F. Supp. 922, 924-925 (E.D. Va. 1972). The government cannot without impugnity violate the basic charter of the land.

The amended complaint alleges generally that there is more than $10,000 in controversy. Plaintiff B. V. Clemons has executed an uncontroverted affidavit swearing that §1395x (v) (5) (A) will cause him to lose substantially more than $10,000 in income. Thus, plaintiffs do not, as defendants argue, aggregate their claims to meet the $10,000 jurisdictional amount.

The Court HOLDS that it has subject matter jurisdiction over plaintiffs' claims for relief.

IV

Plaintiffs assert that §1395x (v) (5) (A) arbitrarily deprives them of equal treatment under the law. Defendants contend that the legislative classification is rationally related to the legitimate governmental purpose of fiscal responsibility.

Plaintiffs view §1395x (v) (5) (A) as a price fixing control which is morally repugnant and constitutionally infirm. Plaintiffs ask in their brief: "why were physical therapists (whose charges amount to less than 1% of Medicare costs) *singled out* among other medical service groups as the target for special price-fixing restrictions?" Plaintiffs label §1395x (v) (5) (A) a hapazard and dis-

criminatory restriction on their income which has no logical justification. Plaintiffs baldly assert that "for some unexplaned reason, HEW wants to put independent physical therapists out of business." Plaintiffs also argue that §1395x (v) (5) (A) is not an economizing measure because it will not in fact result in a reduction of costs.

The Fifth Amendment due process clause incorporates the concept of equal protection and applies it to federal actions. *United States Department of Agriculure* v. *Moreno,* 413 U.S. 528 (1973). When a legislaive classification works to the disadvantage of a "suspect class", see, *Loving* v. *Virginia,* 388 U.S. 1, 11 (1967) (race); *McLaughlin* v. Florida 379 U.S. 184, 191-192 (1964) (race); *Bolling* v. *Sharpe,* 347 U.S. 497, 499 (1954) (race); *Graham* v. *Richardson,* 403 U.S. 365, 372 (1971) (alienage); *Oyama* v. *California,* 332 U.S. 633, 644-646 (1948) (national origin); *Korematsu* v. *United States,* 323 U.S. 214, 216 (1944); *Hirabayashi* v. *United States,* 320 U.S. 81, 100 (1943) (national origin) or interferes with the exercise of a "fundamental" right or liberty, see *Shapiro* v. *Thompson,* 394 U.S. 618, 629 (1963) (right to travel); *Dunn* v. *Blumstein,* 405 U.S. 330, 336 (1972) (right to vote); *Police Department of Chicago* v. *Mosley,* 408 U.S. 92, 101 (1972) (First Amendment rights); *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942) (right of procreation), the Court must determine whether the discrimination was necessary to promote a compelling governmental interest. Plaintiffs assert that their right to practice a profession is fundamental, and any impairment of that right requires strict judicial scrutiny. This argument is wihout merit. Governmental regulation of professions is reviewed by the rational basis test, and not the compelling governmental interest test. *Sec. e.g., Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 488-489 (1955). The rational basis test was

recently stated by the United States Supreme Court in *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164, 172 (1972):

> The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires at a minimum that a statutory classification bear some rational relationship to a legitimate state purpose. *Morey* v. *Doud,* 354 U.S. 457 (1957); *Williamson* v. *Lee Optical Co.,* 348 U.S. 483 (1955); *Gulf, Colorado & Santa Fe R. Co.* v. *Ellis,* 165 U.S. 150 (1897); *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886).

A plaintiff bears a heavy burden of establishing the unconstitutionality of a statute:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 61, 78. "The problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical, it may be, and unscientific." *Metropolis Theatre Co.* v. *City of Chicago,* 228 U.S. 61, 69-70. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Marylan,* 366 U.S. 420, 426.

Dandridge v. *Williams,* 397 U.S. 471, 485 (1970). Section 1395x (v) (5) (A) was enacted to implement a legitimate governmental purpose.

Congress intended to control Medicare costs by limiting fees for physical therapy services when it enacted §1395x (v) (5) (A). See, H.R. Rep. No. 92-231, 92nd Cong., 2d Sess. (1972) reprinted in 1972 U.S. Code Cong. and Armin. News 4989, 5004, 5006, 5095-5096; Conf. R. No. 92-1605, 92d Cong., 2d Sess. (1972) reprinted in 1972 U.S. Code Cong. and Admin. News 5370, 5392. This governmental purpose of conserving limited resources to attain legislatively determined social and social and economic goals is constitutionally permissible. *See, Dandridge* v. *Williams,* 397 U.S. 471, 486-487 (1970); *New Jersey Chapter, Inc. of the American Physical Therapy Association* v. *Prudential,* 502 F. 2d at 505. The legislation is a good faith attempt to limit costs to reasonable fees for physical therapy services. This Court will not speculate about the possible success or failure of the statute in achieving its goal; although the Court notes that plaintiffs' argument that the legislation will not cut costs is attenuated.[4]

Plaintiffs' argument that similar limitations are not imposed on other providers of services is not borne out by an examination of the Medicare Act. A provider of services may only recover the lesser of the reasonable cost of his services or the customary charge for such services. 42 U.S.C. §1395f (b) (1). Even assuming differential treatment, the legislature is not required to solve all problems at once. It may legislate partial solutions, neglecting other equally important problems. *Williams* v. *Lee Optical Co.,*

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[4] In a confusing argument, plaintiffs state that hospitals and nursing homes may actually charge more for physical therapy services performed by institution employees than they do for such services when performed by independent physical therapists. Consequently, the costs may be greater if independent physical therapists are eliminated. This argument, though not plaintiffs', would seem to concede that they would not be economically disadvantaged by §1395x (v) (5) (A).

348 U.S. at 489; *Jefferson* v. *Hackney,* 406 U.S. 535 (1972). Congress was not constitutionally required to attempt to regulate all Medicare costs in the same manner.

The Court HOLDS that §1395x (v) (5) (A) is not violative of the Fifth Amendment to the Constitution of the United States.

WHEREUPON, the Court HOLDS that plaintiffs' motion for summary judgment is without merit, and therefore it is DENIED. The Court FURTHER HOLDS that defendants' motions to dismiss and for summary judgment are meritorious, and therefore they are GRANTED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

B. V. CLEMONS, L.P.T., et al. :

Plaintiffs :

vs. Civil Action 73-530

UNITED STATES OF AMERICA, et al. :

Defendants :

OPINION

Duncan, Judge, dissenting. I must respectfully dissent. While I am in agreement with many of the principles enunciated by the majority, application of these principles to this case gives me pause. The briefs of the parties and the affidavits submitted in support of the cross-motions for summary judgment do not in my opinion adequately answer the questions raised by the enactment of the challenged salary equivalency scheme. Some generalizations perhaps are in order, and I will attempt to set them out below.

The primary inquiry in this case seems obscured by the prolixity of the briefs. Providers which employ in-house therapists can be reimbursed for physical therapy services performed so long as the charge is *reasonable.* See 42 U.S.C. §§1395cc, 1395x (v) (1) (A) and 1395 (1). Not so with respect to the "non-provider," independent physical therapists. The resolution of this case should therefore turn on whether or not there is a rational basis for the statutory esablishment of a "salary equivalency" ceiling for reimbursement of the plaintiff therapists when the statutory standard for medicare reimbursement of in-house therapy

services remains one of "reasonableness." Affording the statute its presumption of constitutionality, I am unable to ascertain the basis for this uneven treatment. There are no facts before us which would indicate a rationale for the continued statutory approval of a "reasonableness" ceiling for services performed in-house and the challenged statutory disapproval of a "reasonableness" standard for services performed by independents. Indeed, the only evidence of record which sheds light on the relative costs to the medicare system of independent *vis a vis* in-house therapy services is the affidavit of one of the plaintiffs, averring that charges for services by independents are in some instances less than those of in-house therapists.

I agree with the majority that it appears facially inconsistent for the plaintiffs to contend on the one hand that the impact of the contested legislaion will be financially devastating for them, and on the other that they are presently able to charge less for the same services than providers with in-house therapists. However, it may well be that current charges for in-house therapy services are based upon cost factors which include fairly low salaries for employee therapists and other costs which are substantially higher than those of a comparable independent therapist. Certain independents with large clienteles might, for example, experience economics of scale which are unavailable to providers which employ their own therapists. Thus, although the indeepndent may have a higher salary ingredient to be computed into the total cost of the service rendered, the other cost factors comprising the independent's actual fee may in fact be less than the non-salary cost factors charged by the provider which has in-house therapists. The total cost of services by the independent may therefore be less.

Under the statute we review, the provider with in-house

employees can continue to charge a reasonable fee and include therein even a profit factor if this is deemed "reasonable" for the particular provider. The independents, however, may only receive fees based upon the salary equivalency ceiling plus operating expenses. Since I can find no basis, on the factual posture in which this case now stands, for an inference that the services of independents are inferior, more expensive, undesirable or unnecessary, I cannot identify the rational basis upon which Congress has acted to treat plaintiffs differently from their cousins, providers with in-house therapy employees.

There are also averments of independents in the record which indicate that the effect of the challenged legislative scheme would be to drive most if not all independents from the medicare services arena. Again, in the posture in which this case reaches us, it is difficult to determine whether such doomsaying has merit or not. The intent of Congress in enacting the salary equivalency provision would appear to be the placing of a limitation upon those fees of independents which are reimbursable. I would think that if the effect of the legislation would be as the plaintiffs allege, it would not be rationally related to the Congressional goal of continuing to provide medicare coverage for the services of independents, albeit with a fee ceiling imposed.

Upon a consideration of the statute, the regulations, the memoranda and the affidavits, I am of the opinion that genuine issues of fact exist as to whether the statute is constitutional in its application to plantiffs. I would therefore deny defendants' motion to dismiss and the cross-motions for summary judgment.

ROBERT M. DUNCAN
Judge United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

B. V. CLEMONS, L.P.T., et al. :
Plaintiffs :
vs. Civil Action 73-530
UNITED STATES OF AMERICA, et al. :
Defendants :

ORDER

For the reasons and on the grounds which more fully appear in the Opinion of this Court filed simultaneously herewith, it is concluded that the claims for relief set forth in the amended complaint are not meritorious and that plaintiffs are not entitled to the declaratory and injunctive relief requested in the amended complaint.

IT IS ORDERED THAT the complaint be, and it hereby is, DISMISSED.

BY ORDER OR THE COURT

JOHN W. PECK
Judge, United States Court of Appeals for the Sixth Circuit

JOSEPH P. KINNEARY
Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

B. V. CLEMONS, L.P.T., et al.
Plaintiffs : Civil Action 73-530
vs.
UNITED STATES OF AMERICA, et al.
Defendants :

JUDGMENT

This action came on before the Court, the Honorable John W. Peck, Judge, United States Court of Appeals for the Sixth Circuit, the Honorable Joseph P. Kinneary, Chief Judge, United States District Court and the Honorable Robert M. Duncan, United States District Judge;

Now therefore, in accordance with the majority opinion and the order entered March 26, 1975, IT IS ORDERED AND ADJUDGED THAT the complaint be, and it hereby is, DISMISSED.

JOHN D. LYTER
Clerk

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

B. V. CLEMONS, L.P.T., et al.,
Plaintiffs,
vs. Civil Action 73-530
UNITED STATES OF AMERICA, et al.,
Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that B. V. Clemons, Vincent H. King, James Hayden, Joe Scott, Louis Cotousky, Robert E. Strzelcyk, Harry D. Thorp, Patrick L. Therriault, Roline D. Swanson, Clifford J. Wedel, Jerry L. Bryant and F. L. Fabrizio, the plaintiffs above named, hereby appeal to the Supreme Court of the United States from the final judgment and order dismissing the Complaint, entered in this action on March 26, 1975.

This appeal is taken pursuant to 28 U.S.C. §1253.

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Trial Attorney for Plaintiffs

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APPENDIX B

Amendment V

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

This reproduces a pertinent part of a section of the Medicare Act as amended in 1972 and codified in the United States Code:

Section 1801 of the Medicare Act (42 U.S.C. §1395) reads in pertinent parts as follows:

"Nothing in this subchapter shall be construed to authorize any Federal officer or employee to exercise any supervision or control over the practice of medicine or the manner in which medical services are provided, or over the selection, tenure, or compensation of any officer or employee of any institution, agency, or person providing health services; or to exercise any supervision or control over the administration or operation of any such institution, agency, or person."

This reproduces pertinent parts of the Ohio Revised Code with respect to physical therapy licensure and corporate practice of professions:

Section 1701.03 provides in pertinent part:

"A corporation may be formed for any purpose or purposes, other than for carrying on the practice of any profession . . ."

Section 1785.01 (A) provides in pertinent part:

"Professional service means any type of professional service which may be performed only pursuant to a license, certificate, or other legal authorization as provided by Chapters . . . 4731 of the Revised Code to . . . physicians and surgeons, and practitioners of limited branches of medicine . . ."

Section 1785.01 (B) provides in pertinent part:

"Professional association means an association organized under Section 1785.01 to 1785.08 inclusive of the Ohio Revised Code for the sole purpose of rendering one of the professional services authorized under Chapters . . . 4731 . . . of the Revised Code."

Section 1785.03 provides in pertinent part:

"A professional association may render professional service only through officers, employees, and agents who are themselves duly licensed or otherwise legally authorized to render professional service within this state."

Section 4731.70 (A) provides in pertinent part:

"The state medical board may refuse to grant a license to an applicant for a license to practice physical therapy or may suspend or revoke the license of any physical therapist licensed by it, for any of the following reasons:

(a) Applying or offering to apply physical therapy independent of the prescription and direction of a person licensed in this state to practice medicine and surgery . . ."

Section 4731.73 (A) provides in pertinent part:

"(A) No person shall practice nor in any way hold himself out as being able to practice physical therapy in this state unless duly licensed in accordance with the provisions of Section 4731.62 and 4731.72, inclusive of the Ohio Revised Code."

Supreme Court, U. S.
FILED
NOV 12 1975
MICHAEL RODAK, JR., CLERK

No. 75-348

In the Supreme Court of the United States

OCTOBER TERM, 1975

B. V. CLEMONS, L.P.T., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

MOTION TO AFFIRM

ROBERT H. BORK,
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REX E. LEE,
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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-348

B. V. CLEMONS, L.P.T., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellees move to affirm the judgment of the district court.

OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1a-14a) is not reported.

JURISDICTION

The judgment of the district court (J.S. App. 16a) was entered on March 26, 1975. A notice of appeal

(J.S. App. 17a) was filed on May 23, 1975. On July 21, 1975, Mr. Justice White extended the time for docketing the appeal to and including September 6, 1975. The appeal was docketed on September 4, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

QUESTION PRESENTED

Whether the Medicare Act impermissibly discriminates against independent physical therapists by limiting the reimbursement of providers for the cost of physical therapy services to an amount equal to the salary that the provider would reasonably have paid to an employee who had performed such services.

STATUTE INVOLVED

Section 1861(v)(5) of the Social Security Act, as added, 86 Stat. 1445-1446, 42 U.S.C. (Supp. III) 1395x(v)(5), provides:

> (A) Where physical therapy services, occupational therapy services, speech therapy services, or other therapy services or services of other health-related personnel (other than physicians) are furnished under an arrangement with a provider of services or other organization, specified in the first sentence of subsection (p) of this section the amount included in any payment to such provider or other organization under this subchapter as the reasonable cost of such services (as furnished under such arrangements) shall not exceed an amount equal to the salary which would reasonably have been paid

> for such services (together with any additional costs that would have been incurred by the provider or other organization) to the person performing them if they had been performed in an employment relationship with such provider or other organization (rather than under such arrangement) plus the cost of such other expenses (including a reasonable allowance for traveltime and other reasonable types of expense related to any differences in acceptable methods of organization for the provision of such therapy) incurred by such person, as the Secretary may in regulations determine to be appropriate.
>
> (B) Notwithstanding the provisions of subparagraph (A), if a provider of services or other organization specified in the first sentence of subsection (p) of this section requires the services of a therapist on a limited part-time basis, or only to perform intermittent services, the Secretary may make payment on the basis of a reasonable rate per unit of service, even though such rate is greater per unit of time than salary related amounts, where he finds that such greater payment is, in the aggregate, less than the amount that would have been paid if such organization had employed a therapist on a full- or part-time salary basis.

STATEMENT

This action was brought in the United States District Court for the Southern District of Ohio by 12 licensed physical therapists. The complaint challenged the constitutionality of Section 1861(v)(5)(A) of the Social Security Act, 42 U.S.C. (Supp. III) 1395x

(v)(5)(A), on the ground that it impermissibly discriminates against independent professional physical therapists by limiting reimbursement of providers for the cost of physical therapy services under the Medicare program to an amount equal to the salary that the provider would reasonably have paid to an employee who had performed such services. The complaint sought declaratory and injunctive relief.

A three-judge court was convened pursuant to 28 U.S.C. 2282. The court, with one judge dissenting, granted appellees' motions for summary judgment and dismissal of the complaint (J.S. App. 1a-14a).

1. Title XVIII of the Social Security Act, commonly known as the Medicare Act, is divided into two parts. Part A, 42 U.S.C. 1395c to 1395i-2, the part principally involved in this litigation, is designed to provide "basic protection against the costs of hospital and related posthospital services" for eligible individuals (42 U.S.C. (Supp. III) 1395c) by providing for government payment (primarily from trust funds derived from employment taxes) of the reasonable cost or customary charge (less specified deductibles) for certain defined basic medical services provided by hospitals, skilled nursing facilities, and home health agencies, which are termed "providers of services" (42 U.S.C. (Supp. III) 1395x(u)).[1] Providers of services are entitled to reim-

[1] Part B of the Medicare Act, 42 U.S.C. 1395j to 1395w, is a voluntary health insurance program financed in part by the government and in part by premiums paid by eligible individuals who elect to enroll in the program. It provides supplementary medical insurance benefits for physician and physician-related services.

bursement under the Medicare program for the reasonable cost of physical therapy services provided to beneficiaries. See 42 U.S.C. 1395d(a), 1395x(m)(2); 42 U.S.C. (Supp. III) 1395x(b)(3), (h)(3), (i), (n). Such services may be furnished either by the provider of services or by others pursuant to arrangements made with the provider.

The Act provides generally that "[t]he reasonable cost of any services [for purposes of reimbursement under the program] shall be the cost actually incurred, excluding therefrom any part of incurred cost found to be unnecessary in the efficient delivery of needed health services" (42 U.S.C. (Supp. III) 1395x(v)(1)(A)). The Act specifies that, where physical therapy and other therapy services are furnished by an independent therapist under an arrangement with a provider, the reasonable cost "shall not exceed an amount equal to the salary which would reasonably have been paid for such services * * * to the person performing them if they had been performed in an employment relationship with such provider * * * plus the cost of such other expenses (including a reasonable allowance for traveltime * * *) incurred by such person, as the Secretary may in regulations determine to be appropriate" (42 U.S.C. (Supp. III) 1395x(v)(5)(A)).[2]

[2] If a provider requires the services of a therapist on a limited part-time basis or only to perform intermittent services, however, the Secretary is authorized in certain circum-

2. The district court held that the "salary-equivalency" provision challenged by appellants "is not violative of the Fifth Amendment" (J.S. App. 11a), because it bears a rational relationship to "a legitimate governmental purpose" (*id.* at 9a). The court stated (*id.* at 10a):

> Congress intended to control Medicare costs by limiting fees for physical therapy services when it enacted § 1395x(v)(5)(A). * * * This governmental purpose of conserving limited resources to attain legislatively determined social and economic goals is constitutionally permissible. * * * The legislation is a good faith attempt to limit costs to reasonable fees for physical therapy services. This Court will not speculate about the possible success or failure of the statute in achieving its goal; although the Court notes that plaintiffs' argument that the legislation will not cut costs is attenuated.

The court disagreed with appellants' contention that physical therapists were singled out among other medical professionals for disfavored treatment, and it held that Congress could, in any event, properly focus its attention upon a particular problem in the program without simultaneously addressing every similar problem (*id.* at 10a-11a):

> Even assuming differential treatment, the legislature is not required to solve all problems at

stances to "make payment on the basis of a reasonable rate per unit of service, even though such rate is greater per unit of time than salary related amounts" (42 U.S.C. (Supp. III) 1395x(v)(5)(B)).

> once. It may legislate partial solutions, neglecting other equally important problems. * * * Congress was not constitutionally required to attempt to regulate all Medicare costs in the same manner.[3]

ARGUMENT

The decision of the district court is correct, and the question presented by the appeal does not merit plenary review.

1. Appellants contend (J.S. 8-10) that the statute must be subjected to strict scrutiny because it invades their "fundamental rights" "to associate together for business and * * * to contract or practice [their] profession" (*id.* at 9-10). No right to practice as a physical therapist is "explicitly or implicitly guaranteed by the Constitution" (*San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 33-34). Even if there were such a constitutionally protected right, it would not be invaded by the provision at issue here, which simply prescribes the method of calculating the reasonable cost of physical therapy services for purposes of Medicare reimbursement from public funds. The Act does not prohibit a provider from arranging to pay a physical therapist an amount greater than that for which the provider may receive reimbursement. Appellants remain free to practice or associate for business as they wish and

[3] Judge Duncan dissented on the ground that, in his view, there existed genuine issues of material fact concerning the constitutionality of the statute as applied to appellants (J.S. App. 12a-14a).

are at liberty to refrain from entering into an arrangement with a provider for the performance of physical therapy services for Medicare beneficiaries. See, *e.g.*, *Szekely* v. *Florida Medical Association*, 517 F. 2d 345 (C.A. 5); *Rasulis* v. *Weinberger*, 502 F. 2d 1006 (C.A. 7).[4]

2. The Fifth Amendment allows Congress broad "latitude in prescribing the conditions upon which funds shall be dispensed from the public treasury" (*Weinberger* v. *Salfi*, No. 74-214, decided June 26, 1975, slip op. 22). Congress determined here that the reasonable costs of services performed by independent physical therapists should approximate the reasonable salary expense that would be incurred by a provider if the same services were performed by an employee. That determination reflects congressional concern "over the increasing costs of physical therapy services and other therapy services furnished in hospitals and extended care facilities," and the resulting statutory provision was aimed at "controlling program expenditures for therapy services and * * * preventing abuse" (H.R. Rep. No. 92-231, 92d Cong., 1st Sess. 110 (1971)).

Reducing the costs of a social insurance program and preventing abuse of the program are legitimate

[4] Even if appellants are correct in asserting that Ohio law forbids providers from employing physical therapists (J.S. 2-4), that would not affect the validity of the Act's method of calculating reasonable costs. The statute prescribes the amount of reimbursement; it does not compel any provider to employ physical therapists.

governmental objectives (see *Weinberger* v. *Salfi*, *supra*, slip op. 24-25), and the means chosen by Congress to accomplish those objectives here are plainly reasonable.

3. Contrary to the dissenting opinion of Judge Duncan, appellants' assertions that the statute will not accomplish its economizing objectives and will "drive most if not all independents from the medicare services arena" (J.S. App. 14a) do not raise triable issues of fact that preclude the granting of summary judgment. Nothing in this Court's decisions suggests that an act of Congress may be sustained only if the government can prove in a district court that the factual underpinnings of the statute are correct. As the district court suggested, it would be inappropriate for a court to "speculate about the possible success or failure of the statute in achieving its goal" (J.S. App. 10a).

The inquiry, rather, is whether "any state of facts reasonably may be conceived to justify" the legislative classification (*McGowan* v. *Maryland*, 366 U.S. 420, 426). Appellants' doubts concerning the probable effects of the provisions limiting reimbursement for physical therapy services should be addressed to Congress, not the courts, and those doubts certainly do not call into question the constitutional validity of the Act.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

REX E. LEE,
Assistant Attorney General.

LEONARD SCHAITMAN,
DAVID M. COHEN,
Attorneys.

NOVEMBER 1975.

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Supreme Court, U. S.
FILED
NOV 28 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-348

B. V. CLEMONS, L.P.T., *et al.*, *Appellants*,

vs.

UNITED STATES OF AMERICA, *et al.*, *Appellees*.

On Appeal From The United States District Court
For The Southern District of Ohio
Eastern Division

REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-348

B. V. CLEMONS, L.P.T., *et al., Appellants,*

vs.

UNITED STATES OF AMERICA, *et al., Appellees.*

REPLY BRIEF

Pursuant to Rule 16 of the Rules of this Court, Appellants respectfully submit this Brief Contra the Appellee's Motion to Affirm.

STATEMENT

The Motion to Affirm prepared by Appellees and served on Appellants on November 14, 1975 fails to refute significant legal questions and issues raised by Appellants in the Jurisdictional Statement. Appellees apparently concede that this Court has jurisdiction to review this case under 28 U.S.C. 1253, that Appellants have properly raised substantial federal questions, and that the statement of the case and summary of this litigation presented by Appellants were fairly stated in the Jurisdictional Statement.

Appellees wish this Court to ignore that the District Court below erred in granting summary judgment where there were genuine issues of fact in dispute (in fact, one Judge below stated that the only evidence which would shed light on the relative cost to the Medicare system of independent vis-a-vis in-house therapy services was supplied by the Plaintiffs.) (J. S. App. 13a). The decision of the District Court below urged as correct by the Appellees, with the authority of affirmance by this Court, would constitute a landmark holding of catastrophic proportions upon the scope of the Fifth Amendment, and would create substantial harm to the delivery of health care to the indigent and elderly in America. Appellants urge that the consequences, both in Ohio and throughout the United States, of the District Court decision clearly deserves plenary consideration by this Court, because the decision of the District Court would establish the following constitutional propositions:

1. That the right to be free from congressionally created classifications admittedly providing for arbitrary and discriminatory treatment within the same classifications, which discrimination is claimed to be justified solely for "cost control" and or "prevention of program abuse", is not protected by the Fifth Amendment. To conceive of the Fifth Amendment in these terms, Appellants contend, is no less than to hold that means are protected while the major end for which these protected means exist is not protected. This view reduces the Fifth Amendment to absurdity.

2. That Congress can enact legislation which may destroy or eliminate the practice of a chosen profession without showing a rational relationship to a legitimate governmental interest. This proposition would amount to a major retreat and limitation on cases previously decided by this Court holding to the contrary.

ARGUMENT

I. The discriminatory scheme called "salary equivalency" cannot be justified on the grounds, as Appellees would have it, that the Fifth Amendment allows Congress broad latitude in prescribing the conditions upon which funds shall be dispensed from the public treasury.

The majority opinion of the District Court, together with Appellee's Motion to Affirm, have given the misleading impression that Appellants are requesting the Court to "speculate about the possible success or failure of the statute involved in achieving its claimed goal". Such is by no means the case. This appeal is not brought lightly, but out of a deep conviction of the importance of the issues involved. The questions presented are too significant to be decided on the merits by summary affirmance of the District Court decision without argument, because of the weight of authority accorded an affirmance.

It can require no argument to support the assertion that reducing the cost of a social insurance program and preventing abuse of the program are legitimate governmental objectives. However, the means employed to accomplish the objectives above must be reasonable and rationally related to the objectives. For example, when the government, in an attempt to reduce costs in the Medicare system, enacted legislation to prohibit proprietary home health agencies from contracting to provide physical therapy services to other providers under the Medicare program, the District and Appellate Courts presented with the above facts ruled that the mere assertion of "cost control" and "prevention of abuse" cannot justify such arbitrary and capricious discrimination. The Courts found that there was not a reasonable

basis or a rational relationship to a legitimate governmental interest between the legislation and the objective claimed.

In *Physical Therapy Services Rehabilitation Agency v. Weinburger,* U. S. District Court, District of Columbia, Civil No. 74-897 (decided July 18, 1975), the District Court, based on the identical facts of the above example, held that the above legislation was capricious and arbitrary in that it discriminates for no sufficient reason between public and non-profit suppliers of physical therapy services, and draws irrational distinctions between the providers of services. The Court rejected the assertion of the government that the discrimination was justified to assure quality of service and to control costs in the Medicare program.

In *American Medical Association v. Weinburger,* Civil No. 73-C-1653 (D.C. Ill. N.D., decided May 8, 1975) [Affirmed, U. S. Court of Appeals, Seventh Circuit, July 22, 1975] the District Court granted plaintiffs injunctive relief from the implementation of a law that was claimed to be justified by the Department of Health, Education and Welfare as necessary to promote cost savings and the prevention of over utilization of health services. The Court expressed, as did Judge Duncan in the instant case, that there were serious questions of whether the regulations were reasonably related to the purposes of the enabling legislation under which they were promulgated. The Court further decided that despite the asserted cost savings purpose of the legislation, the larger purpose of the Medicare program, i.e. the enabling legislation, is the delivery of medical services to those otherwise unable to obtain them. The Court concluded that the implementation of the scheme proposed by the government would not be considered reasonable nor rationally

related to the enabling legislation of the program.

Most significantly, as a direct result of the decisions of the District and Appellate Courts in the above-cited cases, the Department of Health, Education and Welfare quickly decided not to implement the provisions which were rejected by the Courts rather than appeal to this Court. Since the above-cited cases and the Department of Health, Education and Welfare actions were decided and taken subsequent to the instant appeal, appellants submit that plenary consideration would appear to be amply warranted.

In *Bay Ridge Diagnostic Laboratory, Inc. v. Dumpson,* U. S. District Court, Eastern District of New York, No. 75-C-640 (decided August 14, 1975), the State of New York, in a cost-saving measure, proposed to grant exclusive contracts for laboratory services to one laboratory for each of the city's boroughs. The plaintiffs, seven clinical laboratories, brought an action to enjoin this measure because they would be forced out of business. The Department of Health, Education and Welfare entered its appearance as amicus and urged in opposition to New York's measure that despite the cost saving purpose, the measure violated Medicaid law and would thwart the purpose of the Medicaid program. Unless Appellees are urging this Court to apply a standard of judicial scrutiny to cases involving state cost saving measures in the Medicaid program differently than that applicable to those proposed by the federal government in the Medicare program, it should be unquestioned that its position in the instant case cannot be sustained on the slender thread of "reducing costs."

II. Appellees urge this Court to approve of a discriminatory and arbitrary price-fixing scheme for independent physical therapists in violation of the express provisions of the Medicare Act.

Appellees contend (M.A. 7-8) that the statute involved merely prescribes the method of calculating the reasonable cost of physical therapy services for purposes of reimbursement from public funds. Apparently Appellees ignore or are unaware that the "method" has been implemented fixing a different and specific dollar amount in each state for what providers will be paid for an hour of an independent physical therapist's service. Recent decisions of this Court concerning the anti-competitive nature of direct or indirect professional price-fixing in the legal professions, and anti-trust efforts by the Justice Department against the medical profession for price-fixing raises great doubt on this prescribed "method" urged by the Appellees herein.

Appellees fail to point out that despite the fact that all providers under Medicare are subject to the same limitation based upon the reasonable cost for such services, the statute involved herein, in addition to said limitation, only fixes the reimbursement for compensation of independent physical therapists. Thus, there are now two standards to determine the reasonable cost for the same service. The provider will continue to be reimbursed fully for the compensation of the salaried therapist for performing the same service even though said salary is higher than the amount "fixed" for the independent therapist. By no stretch of the imagination or logic can Appellees justify this as "cost control." This is clearly an arbitrary and capricious treatment within the same classification without any rational basis. The

record below does not have even an allegation that the independent therapists were more inefficient, costly or were abusive of the Medicare program. In fact, the record supports the contrary position.

The price fixing scheme urged for affirmance by Appellees still ignore that a section of the Medicare Act specifically prohibits the implementation of such a scheme. Appellants didn't invent Section 1801 of the Medicare Act which prohibits any federal officer or employee from exercising any supervision or control over the compensation of any officer or employee of any institution, agency or person providing health services. This section was enacted as a safeguard to prevent the type of far-reaching and capricious scheme devised herein.

CONCLUSION

For the foregoing reasons, the Supreme Court should note probable jurisdiction and grant Appellants an opportunity to obtain judicial redress.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-348

B. V. CLEMONS, L.P.T., *et al.*, *Appellants*,

v.

UNITED STATES OF AMERICA, *et al.*, *Appellees*.

On Appeal from the United States District Court for the Southern District of Ohio Eastern Division

MOTION AND BRIEF OF THE AMERICAN PHYSICAL THERAPY ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 42(2), the American Physical Therapy Association ("APTA") moves for leave to file the attached brief as *amicus curiae.**

The nature of APTA's interest in this case is as follows:

(1) Resolution of the constitutional issue presented will directly affect a substantial number of APTA's

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* Appellees consented to the filing of the attached statement and a copy of such consent has been filed with the clerk of the Court. Appellants refused to grant their consent.

members. APTA is the largest association of physical therapists in the United States. Approximately 2,500 of APTA's 19,000 members are independent practitioners of physical therapy. The operation of the statute at question admittedly discriminates against such practitioners by limiting the amount of revenue such practitioners can receive from furnishing physical therapy services to Medicare beneficiaries. The question of whether such discrimination meets constitutional standards is the central question presented in this appeal.

(2) The principal function of APTA is to aid in achieving the delivery of quality physical therapy services to members of the public including Medicare beneficiaries. A principal adverse result of the statute in question is that in many instances it will effectively hamper, if not prohibit, the delivery of physical therapy services to Medicare beneficiaries.

(3) APTA has filed suit in the United States District Court for the District of Columbia challenging the statute at issue in this case and its implementing regulation and guidelines. The constitutional question presented here is also at issue in that action and has been stayed pending the resolution of this appeal.

Accordingly, APTA has a substantial interest in seeking to achieve a proper resolution of the issues presented by the instant case.

As detailed in its statement filed herewith, APTA believes that, if the statute cannot be found on its face to deny equal protection of the laws to Appellants, then proper resolution of the question can be made only after evidentiary proceedings allowing the development of a record which will demonstrate the grave effects resulting from the statute, and regulation and

guidelines implementing it. Because of the timing of the case now before this Court that factual background was never developed. In fact a hearing was never held by the three-judge panel below, and the lack of this factual record was the basis for the dissenting opinion. Resolution of the constitutional question of whether or not the equal protection of the laws has been denied depends, of course, upon whether the discrimination against independent therapists found in the statute is rationally related to a legitimate governmental interest. It is imperative therefore, that the purpose of the statute—and about this there is serious question—be measured against its results and against the primary purpose of the Medicare Act, the delivery of quality health care services to the elderly. APTA believes that because of its position and the factual information it has developed concerning the effects of the statute, the attached brief will be useful to the Court in determining this appeal.

Wherefore, for the foregoing reasons, the American Physical Therapy Association respectfully requests that this Motion for Leave to File an Amicus Brief be granted. Filed herewith is our brief as *amicus curiae*.

Respectfully submitted,

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BRIEF OF THE AMERICAN PHYSICAL THERAPY ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

The American Physical Therapy Association (hereinafter "APTA") respectfully submits this brief as *amicus curiae* because the resolution of the important constitutional questions involved will directly affect the livelihood of many of its members, their ability to continue to provide services to Medicare beneficiaries and the availability of physical therapy services to such beneficiaries.

INTEREST OF THE AMICUS CURIAE [1]

APTA, an Illinois corporation, is an association composed of physical therapists licensed to practice physical therapy in their respective states. With 19,000 members, APTA is the largest organization of professional physical therapists in the United States.

Many of APTA's members are independent practitioners of physical therapy—that is, they practice their profession as independent businessmen and not as employees. Under §§ 1395d and 1395k [2] of the Health Insurance for the Aged Act (hereinafter "the Medicare Act"), Medicare programs cover the furnishing of physical therapy services to eligible beneficiaries. Physical therapy services under Medicare may be performed either by an employee of a hospital, skilled nursing facility or home health agency (defined in § 1395x(u) as "providers" of services) or by an independent practitioner who performs services pursuant to a contractual arrangement with the provider. Such contractual arrangements generally provide for the furnishing of physical therapy services to all of the provider's patients, both Medicare beneficiaries and others. It is currently estimated that there are over 3,000 contractual arrangements between providers and independent physical therapists under which approximately 45,000 patients are treated per day.[3]

The continued viability of such independent physical therapists and the continued availability of the services

[1] This brief is filed pursuant to Supreme Court Rule 42(1)&(2).

[2] All section references herein are to the Act as codified in Title 42 of the United States Code.

[3] These figures were developed by APTA from the Bureau of Labor Statistics Hospital Industry Wage Survey (August, 1972) and APTA's Income Survey of Membership, 1974.

they provide to Medicare beneficiaries as well as other patients is directly threatened by § 1395x(v)(5)(A) of the Medicare Act. As a result, on March 21, 1975, APTA filed suit in the District Court for the District of Columbia challenging the constitutionality of § 1395 x(v)(5)(A) (hereinafter referred to as the "salary equivalence statute") and the validity of its implementing regulation and guidelines. *American Physical Therapy Association* v. *Weinberger, et al.*, Civil No. 75-0396. The constitutional issue has been stayed by a three-judge court pending the outcome of this appeal.

THE STATUTE INVOLVED

In 1972 Congress amended the Medicare Act by adding § 1395x(v)(5)(A), which provides in relevant part:

> "Where physical therapy services, occupational therapy services, speech therapy services, or other therapy services or services of other health-related personnel (other than physicians) are furnished under an arrangement with a provider of services or other organization, . . . the amount included in any payment to such provider or other organization under this subchapter as the reasonable cost of such services . . . shall not exceed an amount equal to the salary which would reasonably have been paid for such services (together with any additional costs that would have been incurred by the provider or other organization) to the person performing them if they had been performed in an employment relationship with such provider or other organization . . . plus the cost of such other expenses . . . incurred by such person. . . ." [4]

[4] Social Security Act Amendments of 1972, Pub. L. No. 92-603, § 251(c).

In implementing the statute, the Secretary of Health, Education and Welfare promulgated a salary equivalence regulation and a "Schedule of Guidelines for Physical Therapy Services Furnished Under Arrangements" (hereinafter "guidelines") (40 Fed. Reg. 5760-62 and 5810 (Feb. 7, 1975)). The regulation and guidelines, in effect, limit payment to independent physical therapists under a formula based upon the 75th percentile of hourly salary rates paid by providers in an "appropriate" geographical area[5] increased by a fringe benefit and expense factor and travel allowance.

The discriminatory nature of § 1395x(v)(5)(A) and the regulation and guidelines adopted thereunder result in the following:[6]

(1) The salary equivalence statute and implementing regulation place a ceiling on the revenues which independent practitioners can derive from serving Medicare beneficiaries since providers will agree to pay the practitioner only an amount equal to that which such providers will be reimbursed by Medicare, with the result that many therapists will have to operate at a loss to continue serving Medicare beneficiaries.

(2) Some physical therapists have already been forced to cease furnishing services to providers under contractual arrangements.

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[5] The wage survey employed by the Secretary was the Hospital Industry Wage Survey compiled by the Bureau of Labor Statistics in 1972. This survey covers 21 of the 269 Standard Metropolitan Statistical Areas ("SMSA") in the United States. Wage rates computed from a single SMSA were applied to as many as six different states in establishing salary equivalence under the guidelines.

[6] Evidence as to all of the results described below has been introduced in the District Court for the District of Columbia in *American Physical Therapy Association* v. *Weinberger, et al.*

(3) Many providers have cancelled contracts with independent physical therapists because of the limitation on reimbursements contained in the Act and regulation.

(4) Some providers are now in a position of being unable to furnish physical therapy services to Medicare beneficiaries.

SUMMARY OF APTA'S POSITION

The issues presented by this case are substantial:

(1) For the first time this Court is presented with the question of the constitutionality of the Medicare Act's admittedly discriminatory treatment of independent practitioners of therapy services with respect to payment for services rendered to Medicare beneficiaries.

(2) To sustain such discrimination the government must demonstrate that, at the least, it is rationally related to a legitimate governmental interest. As the dissenting opinion below points out, the government completely failed to demonstrate such a relationship. Accordingly, APTA respectfully submits that the decision below must be reversed.

(3) Because of the far-reaching importance of the Court's decision—this decision could set a precedent that would be ultimately controlling with respect to the method used by the government in reimbursing all professionals and nonprofessionals who provide services to Medicare beneficiaries—this case should not be summarily affirmed. If the unconstitutionality of the discrimination is not clear on the face of the statute and regulation, the case should be remanded for proceedings which will develop a record

demonstrating in detail the operation of the statute, its implementing regulation and guidelines, and their effect on therapists, providers and beneficiaries. As explained subsequently and as recognized in the dissenting opinion below, because of the timing of this action relative to the development and publication of the regulation and guidelines such information was not before the three-judge panel.

ARGUMENT

I. The Statute on Its Face Denies the Equal Protection of the Laws.

Under traditional equal protection standards, applicable to federal legislation by virtue of the Due Process Clause of the Fifth Amendment, a discriminatory legislative classification may be sustained only if it is "rationally related to a legitimate governmental interest."[7] Where assumptions underlying legislative discrimination are wholly unsubstantiated, or evidence is lacking to support such assumptions, the statutory provision creating such discrimination must be held

[7] The irrationality of the discriminatory classification established by the statute is demonstrated by the following example. An independent contractor has furnished physical therapy services to a hospital for years and the hospital-provider has continually received reimbursement for the actual cost of such services under the "reasonable cost" formula which is even now applicable to all therapists except those that are independent contractors. Because of the statute and regulation, the provider will now be reimbursed only in an amount determined by the salary equivalence formula, even if such amount is less than the actual cost incurred by the therapist. However, if the therapist gives up his role as an independent contractor and becomes an employee of the hospital the amount which could be reimbursed would once again be the actual cost of providing the service. In other words, what is *reasonable cost for services performed by an employee is unreasonable for exactly the same services performed by an independent contractor.*

invalid. See *United States Department of Agriculture* v. *Moreno,* 413 U.S. 528 (1973); *James* v. *Strange,* 407 U.S. 128 (1972); *Reed* v. *Reed,* 404 U.S. 71 (1971).

With regard to the salary equivalence statute the only attempt in the court below to define the assumption underlying the discriminatory classification was the government's claim that such classification will result in cost savings. Apparently the majority of the three-judge panel adopted that assumption. That reasoning is flawed in two respects. First, to paraphrase *Moreno,* the assumption that cost savings will ultimately result from the discriminatory classification is totally unsubstantiated by the record.[8] Second, assuming *arguendo* that the statute might achieve some reductions in Medicare costs, the record fails to explain how restricting the scope of this salary equivalence (presumably cost saving) formula to include only independent physical therapists rather than all physical therapists will further the legislative goal.

This failure to explain the dissimilar treatment of persons similarly situated is the basis of Judge Duncan's compelling dissent in *Clemons.* Judge Duncan stated:

> "There are no facts before us which would indicate a rationale for the continued statutory approval of a 'reasonableness' ceiling for services

[8] In fact, contrary to this assumption, Judge Duncan noted in his dissent below:

> "[T]he only evidence of record which sheds light on the relative costs to the medicare system of independent *vis a vis* in-house therapy services is the affidavit of one of the plaintiffs, averring that charges for services by independents are in some instances less than those of in-house therapists."
>
> Jurisdictional Statement at 13a.

> performed in-house and the challenged statutory disapproval of a 'reasonableness' standard for services performed by independents." Jurisdictional Statement at 13a.

Indeed, Judge Duncan in his dissent recognized two results that allegedly would flow from the statute which, if ultimately proved, might require the finding that there is no rational relationship between the discrimination and a legitimate legislative purpose. They are the allegations that (1) the costs of independent physical therapists under Medicare have been in some instances lower than those for in-house therapists and (2) that the statute's ultimate result would be to drive independent physical therapists out of business.

With respect to the first allegation Judge Duncan concluded:

> "Since I can find no basis, on the factual posture in which this case now stands, for an inference that the services of independents are inferior, more expensive, undesirable or unnecessary, I cannot identify the rational basis upon which Congress has acted to treat plaintiffs differently from their cousins, providers with in-house therapy employees." Jurisdictional Statement at 14a.

As to the second allegation he concluded:

> "I would think that if the effect of the legislation would be as the plaintiffs allege, [*i.e.*, drive some independent therapists out of business] it would not be rationally related to the Congressional goal of continuing to provide medicare coverage for the services of independents, albeit with a fee ceiling imposed." Jurisdictional Statement at 14a.

In light of the government's total failure to come forward with evidence justifying the discrimination,

and based on the record below, APTA respectfully submits that the statute places independent and employee therapists into separate classes "on the basis of criteria wholly unrelated to the objective of [the] statute." *See Reed* v. *Reed,* 404 U.S. 71, 75 (1971). Accordingly, the statute should be declared unconstitutional.[9]

II. If the Salary Equivalence Statute Does Not on Its Face Deny Equal Protection of the Laws, This Court Should Vacate the Judgment Below and Remand the Case to the District Court for Further Evidentiary Proceedings.

If the unconstitutionality of the statute is not apparent on its face, this case should be remanded to the District Court to allow a thorough examination of the operation of the statute in the context of the implementing regulation and guidelines and the effects such operation will have on therapists, providers, and beneficiaries. Such effects, which can now be shown as fact rather than conjecture, have in many instances been crucial to this Court in deciding equal protection

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[9] The asserted legislative purpose in reducing Medicare costs might be interpreted to include an intent to prevent fraudulent payment claims under Medicare. But under this approach, because the salary equivalence statute does not extend to in-house therapists or their providers, it must be struck down as under-inclusive. By the same token, because the statute encompasses independent therapists who have never abused the previous system of payments under the Medicare program the statute should also be invalidated because it is overly broad. *See e.g., United States Department of Agriculture* v. *Moreno,* 413 U.S. at 535-36, (rejecting the government's contention that the broad ban against unrelated household participation in the food stamp program was a rational effort to deal with the concern over fraud and abuse), and *Jimenez* v. *Weinberger,* 417 U.S. 628 (1974) (striking down an overly broad statute precluding the payment of social security benefits to all members of a certain class of illegitimate children regardless of need because of Congressional concern over fraudulent claims).

cases. *See e.g., United States Department of Agriculture* v. *Moreno,* 413 U.S. at 531-32; *Humphrey* v. *Cady,* 405 U.S. 504 (1972); and *Weinberger* v. *Wiesenfeld,* 420 U.S. 636 (1975). The ultimate results generated by a discriminatory classification are essential in judging whether the classification is rationally related to a legitimate government purpose. If the government can prove that the purpose of the 1972 amendments is cost savings or the prevention of abuse, the effects generated by the discriminatory classification will materially aid, in fact are essential, in determining whether the statutory purpose is furthered by placing a limitation on the earnings of only independent physical therapists. In that regard, the purpose of the salary equivalence amendment and the effects generated by that amendment must be measured against the principal purpose of the statute—providing quality medical services to eligible Medicare beneficiaries.

The reason that the effects generated by the statute, regulation, and guidelines are not available in the record below is solely a result of the timing of the action relative to the promulgation of the final regulation and guidelines. Plaintiffs filed this action on December 28, 1973. It was not until five months later, on May 28, 1974, that the Department of Health, Education and Welfare first proposed an implementing regulation. (*See* 39 Fed. Reg. 18467-69).

The proposed regulation merely tracked the language of the enabling statute, providing that the "reasonable cost" of physical and other therapy services under arrangements with a provider of services "shall not exceed an amount equivalent to the prevailing

salary and additional costs that would reasonably have been payable by the provider . . . had such services been performed by such person in an employment relationship, plus the cost of other expenses incurred by such person in furnishing services under such an arrangement." (*Id.* at 18468).

The proposed regulation announced that an unspecified "fringe benefit and expense factor" would be included in an unspecified "prevailing salary" figure and that an unspecified "travel allowance" would also be provided. No ranges or estimates of figures were given for the foregoing categories. Rather the proposed regulation announced that it would itself be implemented "by means of separate guidelines" to be promulgated separately for physical and other therapy services.

Thus, even after May 28, 1974 the plaintiffs, faced with an abstract legislative formula and an equally vague proposed "implementing" regulation, were unable to inform the court in precise factual terms on the critical question concerning the harm which would be visited upon them or other physical therapists. Perhaps of equal importance, the court did not have before it facts relating to the effect this statute would have on providers of services, particularly in sparsely populated regions, or to Medicare beneficiaries. It was not until February 7, 1975, that HEW promulgated a final salary equivalence regulation and, more importantly, a "Schedule of Guidelines for Physical Therapy Services Furnished Under Arrangements." (*See* 40 Fed. Reg. 5760-62 and 5810). Despite efforts of Appellant after that date to obtain a hearing on its previously filed motions for a temporary restraining order

and preliminary injunction, where the issue of irreparable harm would have by necessity been carefully considered by the court, no hearing was held and as Judge Duncan points out, the important constitutional questions involved were decided without the benefit of a complete factual record.

It was the guidelines, published in February 1975, which for the first time placed dollar and cents figures on reimbursable amounts under the statute. It was only these figures which drew the harmful impact of the statute into sharper focus. Following this publication, the detrimental impact of the regulation on independent physical therapists, providers of services, and Medicare beneficiaries became factually demonstrable. In several instances contractual arrangements were immediately cancelled by providers who would agree to pay therapists only an amount equal to what they would be reimbursed by Medicare. In other instances, rather than cancel arrangements, providers have forced independent physical therapists to modify their arrangements to limit payment to an amount not to exceed the salary equivalence amount. Since arrangements between providers and independent therapists generally apply to services furnished to both Medicare patients and others, the injurious effect is multiplied.

Other instances demonstrate that some providers, following implementation of the regulation and guidelines, may not be able to afford to hire in-house physical therapists in the event that independent practitioners decline to renegotiate their contractual arrangements. This would be especially true in rural areas where there is no need for full-time physical therapists. This result, if proved, would surely defeat the

fundamental purpose of the Medicare Act in providing health care for the elderly.[10]

APTA respectfully submits that, if it is not clear that the statute is unconstitutional on its face, evidence going to the effects outlined above must be before the trial court before independent physical therapists have had their day in court.

CONCLUSION

For the foregoing reasons, the decision of the United States District Court for the Southern District of Ohio should be reversed or vacated and remanded for further proceedings.

Respectfully submitted,

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[10] As pointed out in Appellants' Jurisdictional Statement, the ability of corporate providers to obtain employee physical therapists if independent contractors must cease furnishing services is, in some instances, highly doubtful because of state licensure requirements. APTA is aware of situations other than Ohio where, for instance, a corporate proprietary hospital could not employ a physical therapist to furnish services to its patients without engaging in the unauthorized practice of physical therapy under state law.